

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEOTHES C. MILLER,

Defendant-Appellant.

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UNPUBLISHED

October 28, 2003

No. 240613

Wayne Circuit Court

LC No. 01-000797-01

Before: Bandstra, P.J., and Hoekstra and Borrello, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from a circuit court order denying his motion for resentencing or to withdraw his guilty plea. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with carjacking, MCL 750.529a, conspiracy to commit carjacking, MCL 750.157a(a), armed robbery, MCL 750.529, conspiracy to commit armed robbery, and possession of a firearm during the commission of a felony, MCL 750.227b. Pursuant to a plea bargain/sentence agreement, defendant agreed to plead guilty to armed robbery and felony-firearm for which he would be sentenced to imprisonment for five to twenty years and two years, respectively. The sentence agreement was based on a preliminary sentencing guidelines range of 51 to 85 months. There was an error in the scoring of the prior record variables which, when corrected, resulted in a minimum sentence range of 81 to 135 months. Defendant reaffirmed his plea based on a new sentence agreement of imprisonment for seven to twenty years and two years.

Defendant later sought relief on the ground that, in addition to the errors in scoring the prior record variables, the offense variables had been improperly scored. Had they been correctly scored, the minimum sentence range would have been 51 to 85 months and thus he should have been sentenced in accordance with the original sentence agreement. The trial court ruled that defendant had waived any claim of error by accepting the revised sentence agreement.

The general rule is that “a party cannot request a certain action of the trial court and then argue on appeal that the action was error.” *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Likewise, a defendant may not claim error regarding an issue on appeal to which his lawyer acquiesced below. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). In such cases, the issue is waived and there is no error. *People v Carter*, 462 Mich 206, 208-209;

612 NW2d 144 (2000). However, the action is still subject to review for ineffective assistance of counsel. *Id.* at 218; *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001).

Defendant raised the issue of ineffective assistance of counsel below. Because the trial court did not conduct an evidentiary hearing, review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff'd* 468 Mich 233; 661 NW2d 553 (2003) (citations omitted).]

We agree that the offense variables were improperly scored. Defendant was assessed twenty-five points for OV 12, contemporaneous criminal acts, indicating that there were three or more contemporaneous felonious criminal acts involving crimes against a person. MCL 777.42(1)(a). The contemporaneous criminal acts were carjacking and two counts of conspiracy. Carjacking is a crime against a person. MCL 777.16y. Although the crimes defendant conspired to commit were crimes against a person, the conspiracy itself is a crime against public safety. MCL 777.18. Therefore, OV 12 was improperly scored and defendant should have been assessed ten points for three or more contemporaneous felonious criminal acts involving other crimes. MCL 777.42(1)(c). Defendant was also assessed five points for OV 16, the value of the property obtained. MCL 777.46. However, armed robbery is a crime against a person, MCL 777.16y, and OV 16 is not to be scored for crimes against persons. MCL 777.22(1). Had the offense variables been properly scored, defendant would have been in the C-II category, for which the guidelines are 51 to 85 months. MCL 777.62. Counsel's failure to object cannot be deemed reasonable where it resulted in defendant receiving a higher minimum sentence than previously agreed to, and defendant was prejudiced by the error. Accordingly, we remand for resentencing in accordance with the original sentence agreement or withdrawal of the plea.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Richard A. Bandstra  
/s/ Joel P. Hoekstra  
/s/ Stephen L. Borrello